STATE OF MICHIGAN

IN THE SUPREME COURT

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MAKENZIE GREER, Minor,
KENNETH GREER, Individually and
as Conservator for MAKENZIE
GREER, and ELIZABETH GREER,

Plaintiffs/Appellees/
Cross-Appellants,

vs

ADVANTAGE HEALTH and
ANITA R. AVERY, MD,

Defendants/Appellants/
Cross-Appellees,

And

TRINITY HEALTH-MICHIGAN,
d/b/a ST. MARY'S HOSPITAL, and
KRISTINA MIXER, MD,

Defendants.
_____/

SUPREME CT DOCKET NO:
149494

CT OF APPS DOCKET NO:
312655

KENT CO CIR CT FILE NO:
10-09033-NH

BRIEF OF PLAINTIFFS GREER IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL FILED ON BEHALF OF ADVANTAGE HEALTH AND DR. ANITA R. AVERY, MD

149494

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Plaintiffs/Appellees say no.

Defendants/Appellants Advantage Health and Dr. Avery say yes.

Trial court said no.

Court of Appeals said no.

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COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

On September 7, 2010 plaintiffs Kenneth Greer, Individually and as Conservator for Makenzie Greer, a minor, and Elizabeth Greer individually filed the present complaint. [Docket entry 222]. The complaint was filed against four health care providers: Advantage Health; Dr. Anita R. Avery, MD; Trinity Health-Michigan, d/b/a St. Mary's Hospital; and Dr. Kristina Mixer, MD. Liability was to be imposed jointly and severally, and arose out of the devastating,

negligently performed delivery of Mr. and Mrs. Greer's daughter Makenzie on September 28, 2008. [Complaint, ¶¶ 4, 19, 24, 39]. Mr. Greer, acting as Conservator for his daughter, sought damages for the injuries sustained by Makenzie, which included hypoxic brain injury, respiratory depression, metabolic acidosis, permanent and irreversible brain damage, and blindness. [Complaint, ¶¶ 24, 39].

Mr. Greer, Individually and as Conservator for Makenzie, made claim for medical expenses incurred for treatment of Makenzie. [Complaint, ¶ 41]. Mrs. Greer made claim for personal injuries she herself sustained as a result of the botched delivery, including a uterine rupture, urethral injury, disfigurement and scarring. [Complaint, ¶¶ 24, 43]. And Mr. Greer sought damages for loss of consortium for the injuries sustained by his wife. [Complaint, ¶ 42]. Discovery, as well as the normal procedures attendant in a complicated medical malpractice case, ensued. Eventually the Greers and St. Mary's Hospital entered into a confidential settlement. That settlement was for $600,000.00 for all claims brought by the Greers. [Opinion and Order of August 8, 2012, p 5 - docket entry 23; June 7, 2012 motion hearing, pp 9, 11 – docket entry 27]. (Dr. Mixer had been dismissed, without prejudice, in an earlier Stipulation and Order of Dismissal. [Docket entry 189].)

Once St. Mary's had completed its settlement and been dismissed pursuant to the order approving the settlement and dismissing the action as to it [docket entries 69, 70], the case continued against Advantage Health and Dr. Avery. Trial began before Kent County Circuit Court Judge the Hon James Robert Redford on April 17, 2012 and continued until the jury returned its verdict on April 27, 2012. [Trial Trs I – IX]. The jury found no cause for action as to the individual claims of Mr. and Mrs. Greer [4/27/12 Trial Tr, pp 5-6] but found in favor of Makenzie and awarded substantial damages. [4/27/12 Trial Tr, pp 4-7; Special Verdict for Makenzie Greer - docket entry 37].

Various post-trial motions were then filed by both parties, two of which are pertinent to the application for leave to appeal filed by Advantage Health and Dr. Avery and the application for leave to appeal as cross-appellants filed by the Greers. [Docket entries 34, 33, 31]. On August 8, 2012 Judge Redford issued a seven page Opinion and Order regarding those motions, concluding that judgment would enter against Dr. Avery and Advantage Health in the sum of $1,058,825.56 plus taxable costs. [8/8/12 Opinion and Order, p 7 – docket entry 23]. On August 28, 2012 Dr. Avery and Advantage Health filed a motion for reconsideration [docket entry 15], which was denied in an Opinion and Order of September 12, 2012. [Docket entry 8]. Accordingly on September 14, 2012 the court entered its Order For Judgment in favor of Kenneth Greer, Conservator for Makenzie Greer against defendants Anita R. Avery, MD and Advantage Health, jointly and severally, in the sum of $1,058,825.56 plus taxed costs [docket entry 4], and entered an order taxing costs against Advantage Health and Dr. Avery in the sum of $32,393.80. [Docket entry 6]. Advantage Health and Dr. Avery timely filed an appeal of right with the Court of Appeals.

In a published opinion of May 13, 2014 [Docket No. 312655], the Court of Appeals affirmed in part and reversed in part. The court affirmed Judge Redford's ruling that damages for medical expenses awarded Makenzie were not to be reduced, in whole or in part, by payments made by, or discounts given to, health insurers due to liens which they asserted, holding that those payments were not "collateral sources" under MCL 600.6303. It is from that ruling that Advantage Health and Dr. Avery seek leave to appeal. The Greers file this brief in opposition to that request.

The Court of Appeals also ruled that the full $600,000.00 settlement received by all three Greers, to compensate them for their individual claims, was to be set off only against Makenzie's

recovery, not just the amount of the settlement apportioned to Makenzie. The Greers have separately asked this court for leave to cross appeal from that ruling.

ISSUE AND DISCUSSION

DID THE TRIAL COURT ERR IN RULING THAT ADVANTAGE HEALTH AND DR. ANITA R. AVERY, MD WERE NOT ENTITLED TO A REDUCTION IN THE MEDICAL DAMAGES AWARDED MAKENZIE GREER UNDER THE COLLATERAL SOURCE STATUTE, MCL 600.6303?

This is the fourth time an essentially identical argument as is made by Advantage Health and Dr. Avery has been brought to this court. On the three prior occasions this court has rejected the request to consider the argument. The Greers ask this court to reject that request for a fourth time.

The medical expenses incurred for treatment of Makenzie were stipulated to as $425,533.75. Appellants' attorney made the reservation to that stipulation quoted at pages v-vi of their application. [4/25/12 Trial Tr, pp 3-4]. Judge Redford informed the jury of this stipulation in his instructions following presentation of proofs. [4/25/12 Trial Tr, pp 107-108].

The jury returned its Special Verdict awarding that sum to Makenzie. [Special Verdict Answer to Question 3]. In their post-trial motion, appellants argued that this stipulated figure should be reduced to the amount paid by the medical insurers, who had asserted reimbursement liens against any recovery the Greers might make. In both his Opinion and Order on the post-judgment motions of August 8, 2012, page 3, and his Opinion and Order Denying Appellants' Motion for Reconsideration of September 12, 2012, page 2, Judge Redford correctly ruled that settled law precluded appellants from the relief they sought. In this ruling Judge Redford was eminently correct, for under both the common law and the collateral source statute, MCL

600.6303, the appellants were not entitled to any reduction whatsoever in the amount awarded Makenzie for medical expenses.

Under the common law insurance proceeds could not be set off against a plaintiff's recovery. As noted in *Tebo v Havlik*, 418 Mich 350, 366; 343 NW2d 181 (1984):

> "The common-law collateral-source rule provides that the recovery of damages from a tortfeasor is not reduced by the plaintiff's receipt of money in compensation for his injuries from other sources. *Motts v. Michigan Cab Co.*, 274 Mich. 437, 264 N.W. 855 (1936); *Perrott v. Shearer*, 17 Mich. 48 (1868). In the context of insurance, the rationale for the rule is that the plaintiff has given up consideration and is entitled to the contractual benefits. The plaintiff's foresight and financial sacrifice should not inure to the benefit of the tortfeasor, who has contributed nothing to the plaintiff's insurance coverage. Similarly, gratuitous compensation should not inure to the benefit of the tortfeasor. The tortfeasor has contributed nothing, except the activity which caused the plaintiff's injuries."

Thus under the common law appellants would be responsible for all medical expenses incurred for the treatment of Makenzie, whether insurance paid for them or not.

Appellants argue that the difference between the medical bills and the amounts paid by the health insurers, the so-called "insurance discount", should be considered a "collateral source" and therefore deductible from the medical expenses awarded Makenzie by the jury under MCL 600.6303. It does this by creating a formal division of the stipulated medical expenses into two parts: those paid by the health insurers, and this so-called "insurance discount". Interestingly, nowhere in the statute is there any reference whatsoever to an "insurance discount".

MCL 600.6303 states, in its entirety:

> "(1) In a personal injury action in which the plaintiff seeks to recover for the expense of medical care, rehabilitation services, loss of earnings, loss of earning capacity, or other economic loss, evidence to establish that the expense or loss was paid or is payable, in whole or in part, by a collateral source shall be admissible to the court in which the action was brought after a verdict for the plaintiff and before a judgment is entered on the

verdict. Subject to subsection (5), if the court determines that all or part of the plaintiff's expense or loss has been paid or is payable by a collateral source, the court shall reduce that portion of the judgment which represents damages paid or payable by a collateral source by an amount equal to the sum determined pursuant to subsection (2). This reduction shall not exceed the amount of the judgment for economic loss or that portion of the verdict which represents damages paid or payable by a collateral source.

(2) The court shall determine the amount of the plaintiff's expense or loss which has been paid or is payable by a collateral source. Except for premiums on insurance which is required by law, that amount shall then be reduced by a sum equal to the premiums, or that portion of the premiums paid for the particular benefit by the plaintiff or the plaintiff's family or incurred by the plaintiff's employer on behalf of the plaintiff in securing the benefits received or receivable from the collateral source.

(3) Within 10 days after a verdict for the plaintiff, plaintiff's attorney shall send notice of the verdict by registered mail to all persons entitled by contract to a lien against the proceeds of plaintiff's recovery. If a contractual lien holder does not exercise the lien holder's right of subrogation within 20 days after receipt of the notice of the verdict, the lien holder shall lose the right of subrogation. This subsection shall only apply to contracts executed or renewed on or after the effective date of this section.

(4) As used in this section, "collateral source" means benefits received or receivable from an insurance policy; benefits payable pursuant to a contract with a health care corporation, dental care corporation, or health maintenance organization; employee benefits; social security benefits; worker's compensation benefits; or medicare benefits. Collateral source does not include life insurance benefits or benefits paid by a person, partnership, association, corporation, or other legal entity entitled by law to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages. Collateral source does not include benefits paid or payable by a person, partnership, association, corporation, or other legal entity entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3).

> (5) For purposes of this section, benefits from a collateral source shall not be considered payable or receivable unless the court makes a determination that there is a previously existing contractual or statutory obligation on the part of the collateral source to pay the benefits."

In *People v Schaefer*, 473 Mich 418, 430-431; 703 NW2d 774 (2005), this court succinctly set out principles for interpreting statutes:

> "When interpreting a statute, it is the court's duty to give effect to the intent of the Legislature as expressed in the actual language used in the statute. It is the role of the judiciary to interpret, not write, the law. If the statutory language is clear and unambiguous, the statute is enforced as written. Judicial construction is neither necessary nor permitted because it is presumed that the Legislature intended the clear meaning it expressed." [Fns omitted]

As noted above, the collateral source statute, MCL 600.6303, is contrary to the common law collateral source doctrine. It is well recognized that in such case, the statute must be narrowly construed. See *Velez v Tuma*, 492 Mich 1, 11-12; 821 NW2d 432 (2012); *Nation v W.D.E. Electric Co*, 454 Mich 489, 494-495; 563 NW2d 233 (1997). The Court of Appeals in the present case recognized these rules of construction when rejecting the argument raised by appellants. [Slip opinion, p 10].

The definition of collateral source, found in MCL 600.6303(4), contains one sentence which is dispositive of appellants' argument, for the last sentence states:

> "Collateral source does not include benefits paid or payable by a person, partnership, association, corporation, or other legal entity entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3)."

It is undisputed that contractual liens were exercised in the present case by the health insurers. By itself, the language of the statute rebuts the argument of the appellants. Case law, however, is even more dispositive.

The only published appellate decision regarding the issue is *Zdrojewski v Murphy*, 254 Mich App 50; 657 NW2d 721 (2002). Although Advantage Health and Dr. Avery seem to contend that the issue they seek to raise to this court was not brought to the attention of the Court of Appeals panel in *Zdrojewski*, this seems incorrect, as the Court of Appeals summarized the defendants' argument in that case:

> "Defendants next claim that the trial court erred in refusing to reduce the amount of economic damages awarded to plaintiff in the verdict by the amount of medical expenses paid by plaintiff's health insurers. Defendants argue that plaintiff's insurers paid more than $88,000 of her medical expenses, yet they claimed less than $30,000 in their liens against plaintiff's judgment. According to defendants, the difference between the amounts paid by plaintiff's insurers and the amounts asserted by the insurers in their liens constitutes a collateral source benefit under M.C.L. § 600.6303, and the trial court erred by failing to reduce the judgment pursuant to the requirements of the statute."

The Court of Appeals rejected that contention, stating at p 70:

> "Here, as of April 1999, BCBSM and Medicare properly exercised their liens under the statute. The record is not clear whether they have further exercised their lien rights since then or whether they may do so in the future. Regardless of those considerations, the statute does not make any provision for a situation where a lien has been exercised, but for an amount less than the lienholder would be legally entitled to recover. Because the statute clearly states that benefits subject to an exercised lien do not qualify as a collateral source, and BCBSM and Medicare exercised their liens, health insurance benefits provided by BCBSM and Medicare to plaintiff do not constitute a collateral source under M.C.L. § 600.6303(4)."

On three subsequent occasions the Court of Appeals considered arguments essentially identical to those made in the present case. In all three cases the Court of Appeals, following *Zdrojewski*, rejected the arguments. And in all three cases this court denied the defendants' applications for leave to appeal. Thus in *Wilson v Keim* (Docket Nos. 275997, rel'd 7/24/08), the Court of Appeals rejected the defendants' argument that the differential between the amount of the claimed lien and the amount of the medical bills themselves represented a collateral source

under the statute. See Section VII, slip opinion pp 15-18. An application for leave to appeal was denied. *Wilson v Keim*, 483 Mich 900; 761 NW2d 96 (2009) [Docket Nos. 137221, 137222, 137223]. [Copies of the Court of Appeals decisions and orders denying leave to appeal in this and the other unpublished decisions referred to are attached hereto].

In *Hall v Bartlett* (Docket No. 288293, 290147, rel'd 3/29/11), the Court of Appeals again rejected the same argument (at slip opinion pp 20-22). And again, this court denied the hospital's application for leave to appeal. *Hall v Bartlett*, 490 Mich 860; 801 NW2d 885 (2011). [Docket No. 143048].

Most recently, the same argument made in the present case was again rejected. *Detary v Advantage Health* (Docket No. 308179, rel'd 11/29/12). Ironically, not only was the defendant in that case the same as in the present case, but so, too, was the defendants' attorney. The argument made by that attorney was set out by the Court of Appeals, at slip opinion p 7:

> "Defendant next contends that the jury's award should have been set off by the amount negotiated as a discount by plaintiff's insurance company pursuant to MCL 600.6303. On reconsideration, defendant argued to the trial court that while plaintiff's medical bills were, indeed $213,000, her health care insurer, Blue Cross and Blue Shield, negotiated a payment in full for far less, which was accepted as full payment for the services rendered by her health care providers. Defendant reasserts on appeal that payment of the medical bills in full by plaintiff's health care insurer requires setting off the judgment pursuant to the collateral source payment statute, MCL 600.6303, to the amount actually paid by the insurer, adjusted for comparative negligence. We disagree."

And once again, this court denied defendants' application for leave to appeal. *Detary v Advantage Health*, 493 Mich 970; 829 NW2d 862 (2013) [Docket No. 146491].

In their application Advantage Health and Dr. Avery cite several foreign cases. Strangely, in so doing they claim that the states involved had "similar collateral source statutes". [Application, p 13]. This is an unfortunate misstatement, for in none of the statutes interpreted

by those courts was there a provision excepting from the definition of collateral source one in which a lien is claimed. Thus in *Swanson v Brewster* 784 NW2d 264 (Minn S Ct, 2010), the collateral source statute, Minn Stat §548.251(1) contains no language removing from the collateral source definition a payment for which a lien is asserted. To the same effect, Idaho Code §6-1606, involved in *Dyet v McKinley*, 139 Idaho 526; 81 P3d 1236 (2003) and McKinney's CPLR §4545, applied in *Kastik v U-Haul Co of Western Michigan*, 740 NYS2d 167; 292 AD2d 797 (2002) likewise contain no language regarding the assertion of liens. Yet Michigan's statute expressly removes from the definition of a collateral source benefits paid or payable by an entity entitled to a contractual lien where that lien has been exercised, and it is undisputed that contractual liens were indeed exercised in this case.

The argument by Advantage Health and Dr. Avery can be reduced to a simple wish on their part, that the last sentence in the statute's definition of collateral source would read as follows:

> "Collateral source does not include benefits paid or payable by a person, partnership, association, corporation, or other legal entity entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3), *to the extent of that lien.*"

Whether this additional language is or is not desirable can be debated, but that debate should not be in this court, but rather in the Legislature. As this court has repeatedly advised, courts, including this court, are to apply the language of the statute as written, and not to rewrite, or add to, the statute itself. Yet that is what defendants/appellants ask this court to do. This court should decline that request.

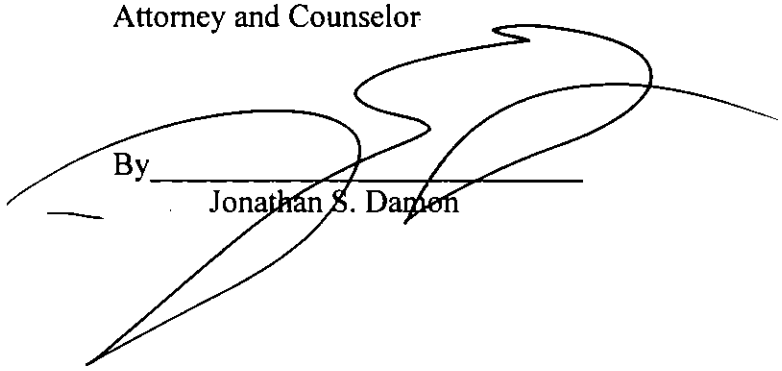
RELIEF REQUESTED

For the reasons expressed above it is requested by plaintiffs Greer that the application for leave to appeal filed on behalf of defendants Advantage Health and Dr. Anita R. Avery, MD be denied. The Greers also ask this court to grant their application for leave to appeal as cross-appellants, separately filed.

DATE: July 8, 2014

Respectfully submitted,

JONATHAN SHOVE DAMON
Attorney and Counselor



By_____
Jonathan S. Damon